



# State Water Resources Control Board

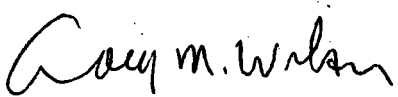


Alan C. Lloyd, Ph.D.  
Agency Secretary

Office of Chief Counsel  
1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

Arnold Schwarzenegger  
Governor

**TO:** Water Quality Attorneys

**FROM:**   
Craig M. Wilson  
Chief Counsel  
**OFFICE OF CHIEF COUNSEL**

**DATE:** June 2, 2005

**SUBJECT:** PROCEDURAL REQUIREMENTS AND APPELLATE REVIEW OF  
WAIVERS OF WASTE DISCHARGE REQUIREMENTS

## ISSUES

What are the procedural requirements that Regional Water Quality Control Boards (Regional Water Board) must follow in adopting waivers of waste discharge requirements pursuant to Water Code section 13269? Under what standards do the State Water Resources Control Board (State Water Board) and courts review waivers?

## CONCLUSIONS

Waivers of waste discharge requirements must now include numerous conditions and may require applications and annual fees. Such waivers will usually be subject to the procedural requirements for quasi-judicial actions and will be subject to review by courts using independent judgment. There may still be some waivers that are adopted as Basin Plan amendments, and these follow quasi-legislative procedures.

## DISCUSSION

The determination of whether an administrative action is quasi-legislative or quasi-adjudicative can have implications for the type of process that must be followed, whether *ex parte* contacts are allowed, and the standard for judicial review. In prior memoranda, the Office of Chief Counsel has generally concluded that actions that affect individuals and small groups are quasi-judicial, while actions that affect large groups are usually quasi-legislative. (Memorandum from William R. Attwater to Regional Water Board members, dated August 13, 1992.) The memoranda have provided examples of quasi-judicial actions as permits, enforcement actions,

and exceptions from prohibitions, while Basin Plan amendments, guidelines, and regulations were stated to be quasi-legislative. (*Id.*, Memorandum from Craig M. Wilson to William R. Attwater, dated March 9, 1981.) In a memorandum concerning a waiver of waste discharge requirements that was adopted as a guideline, the waiver was considered quasi-legislative. (Memorandum from Craig M. Wilson to John Norton, dated January 22, 1988.)

Since these memoranda were written, there have been a number of revisions to the applicable law and the Water Boards' processes, which require reconsideration of the legal position on whether waivers are quasi-legislative or quasi-adjudicative. First, the legislature adopted the Administrative Procedure Act (APA) in 1997, which resulted in clarification of the types of proceedings that are quasi-adjudicative and the procedural requirements for such proceedings. Second, the legislature enacted Government Code section 11352 in 1992, which specifically exempted waivers (along with water quality certifications and waste discharge requirements) from the procedural requirements for adoption of regulations. Third, the Water Boards have adopted a number of regulatory actions that are more difficult to distinguish as quasi-legislative or quasi-judicial. General permits often cover discharges from entities throughout the state and engaged in a wide variety of activities. (For example, the general industrial storm water permit is a statewide permit that applies to dischargers engaged in numerous different industrial activities.) Areawide municipal storm water permits are "individual permits" that may have as many as 85 cities named as co-permittees. Despite the broad coverage of these permits, the Water Boards have treated these actions as quasi-adjudicative because they are subject to the hearing requirements in the federal regulations.<sup>1</sup> Finally, the recent statutory amendments to Water Code section 13269 now have resulted in waivers being a determination of individual rights, even though they may apply to a large number of dischargers, rather than a broad legislative ruling. Waivers now must include numerous conditions and monitoring requirements, and may include annual fees. (See, Wat. Code, § 13269.) At the time the earlier memos were written, waivers were only required to be conditional and not against the "public interest." These waivers were adopted as resolutions, guidance, or Basin Plan amendments, and frequently were one to two sentences in length. Waivers now have the types of detailed requirements that are traditionally found in permits, and are subject to the same enforcement options as permits.

Cases distinguishing between quasi-judicial and quasi-legislative are based on the function performed rather than the procedure followed. (*Shapell Industries v. Governing Board* (1991) 1 Cal.App.4th 218, 230-1; Witkin, California Procedure, Writs § 269.) Formulation of a general policy for governing future permit decisions, unlike the application of such rules to a peculiar set of facts in an individual case, is considered quasi-legislative. (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158.) (*Wilson v. Hidden Valley Municipal Water District* (1967) 256 Cal.App.2d 271.) Thus, when waivers were essentially broad rules or

<sup>1</sup> In numerous court challenges to these permits, the Water Boards have consistently claimed review is under Code of Civil Procedure section 1094.5, discussed *infra*. In recent court decisions, federal courts have imposed the same procedural requirements in general permits as apply to individual permits. (*Environmental Defense Center v. Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832.)

policies applicable to categories of discharges that met the listed conditions, the actions were considered quasi-legislative. (See, Memorandum from Craig M. Wilson to John Norton, dated January 22, 1988 (waiver adopted as a guideline is a general statement applicable to many situations).) At the time, section 13269 required no more than a finding that waiving waste discharge requirements was "in the public interest," and that waivers be conditional.

Most of the cases that discuss the difference between quasi-judicial and quasi-legislative actions have the purpose of determining the appropriate standard for judicial review of the agency action. In general, regular mandamus (Code Civ. Proc., § 1085) is available for quasi-legislative actions, while administrative mandamus (Code Civ. Proc., § 1094.5) applies to quasi-adjudicative actions. Section 1085 affords greater deference to an agency, due to the notion of separation of powers between the judicial and legislative branches of government and the regulatory expertise of quasi-legislative administrative bodies. (8 Witkin, California Procedure, Writs § 268; *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 567.) Generally, quasi-judicial actions are subject to review under section 1094.5. (Witkin, *supra*, at § 257.)<sup>2</sup>

Previously, the courts generally equated the right to independent judgment review with a protected right of due process. In 1979, however, the California Supreme Court ruled that there was no constitutional right to review under section 1094.5 for adjudicative proceedings. (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board* (1979) 24 Cal.3d 335.) Now, the issue therefore turns on the statutory provisions applicable to the type of proceeding.<sup>3</sup> For purposes of review of waivers adopted as separate resolutions under Water Code section 13269, it seems clear that judicial review is under Code of Civil Procedure section 1094.5. Such waivers are adopted under section 13269, which is part of article 4 of Chapter 4 of Division 7 of the Water Code (the Porter-Cologne Water Quality Control Act). Water Code section 13320 provides for State Water Board review of all actions (and failures to act) under Article 4 and section 13330 provides that court review of such actions is subject to Code of Civil Procedure section 1094.5 and that the appropriate standard of review for actions subject to review under section 13320 is independent judgment. Where a Regional Water Board issues a waiver as part of a Basin Plan amendment, the answer is not so clear. While the substantive waiver must presumably comply with section 13269, review of Basin Plan amendments are not subject to petition under section 13320, and instead are reviewed under Water Code section 13245 and are subject to traditional mandamus. (*Marina County Water*

---

<sup>2</sup> While the standard for review for general mandamus actions affords more deference to an agency's interpretation of the law than for administrative mandamus, this result is tempered by substantial deference afforded administrative mandamus pursuant to recent court rulings. (See, *Fukuda v. City of Angels* (1999) 20 Cal.4th 805; see also, *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866 (according due deference to the State Water Board's interpretation of the Clean Water Act and Porter-Cologne).)

<sup>3</sup> Where the statute does not clarify the type of review applicable, the issue will still be whether the administrative action is quasi-legislative or quasi-judicial. (*Western States, supra*, at 568.)

*District v. State Water Resources Control Board* (1984) 163 Cal.App.3d 132.)<sup>4</sup> In light of the different procedural position, it must be assumed that such a waiver would be subject to traditional mandamus review.

In addition to the question of the standard of judicial review, the issue of whether the action is quasi-adjudicative or quasi-legislative is relevant to the propriety of *ex parte* communications with Board members who act on the waiver. While all *ex parte* communications should be avoided,<sup>5</sup> the rules are more restrictive for quasi-adjudicative matters. In 1997, the APA was amended to include strict rules against *ex parte* communications in quasi-adjudicative proceedings. (Gov. Code, §§ 11430.10 et seq.) The only exceptions to the prohibition that are applicable to the Water Boards are communications concerning a procedural matter *that is not in controversy* (§ 14430.20) and staff advice in an adjudicative proceeding that is non-prosecutorial (§ 11430.30). The State Water Board has adopted these rules. (Cal. Code Regs., tit. 23, § 648.)

It is necessary to establish which rules apply to waiver actions, so as to ensure that these proceedings comply with all applicable requirements, including *ex parte* requirements. While waivers do have some of the attributes of regulations (similar to general permits and general waste discharge requirements), the better view is to assume that most waivers—except those adopted as Basin Plan amendments—will be quasi-adjudicative. While these waivers may apply to broad categories of dischargers, they have more attributes of adjudicative actions. The proceedings are more formal hearings, review is by a petition process established for permits and enforcement actions, and judicial review is by the statute established for quasi-adjudicative actions. The waivers as applied to individual dischargers also contain detailed and specific requirements, including monitoring requirements, and may be accompanied by fees. Substantial fines and penalties may be assessed to dischargers who violate the conditions in waivers. The most important test is the function of the action. (Witkin, California Procedure, Extraordinary Writs, § 269.) In light of the recent amendments to Water Code section 13269, the function of a waiver is as a regulatory tool, and not as a simple rule to waive waste discharge requirements. In light of the significant individual determinations that are part of a waiver procedure—including monitoring requirement, fee assessments, and reporting requirements—the better result is to consider these as quasi-adjudicative, and to apply the procedural safeguards attendant to such

<sup>4</sup> The court in *Marina* interpreted an earlier version of section 13330, which more clearly applied only to the quasi-judicial actions subject to State Water Board review by a section 13320 petition. The current language in section 13330 refers more broadly to a “decision or order” issued by the State Water Board under Porter-Cologne. Nonetheless, section 13330 should be read as applying only to review of quasi-judicial actions because of its reference to “decision or order”—terms generally associated with quasi-judicial actions—and in light of the legislative history, which refers to the intent to clarify existing law. Clearly, there was no intent to overrule the holding in *Marina* that basin planning is subject to traditional mandamus (C.C.P. § 1085) review.

<sup>5</sup> See memorandum from William R. Attwater, dated August 13, 1992.

actions. Finally, by applying the *ex parte* rules for quasi-judicial actions, there will be less chance of a waiver being invalidated because of improper communications.

cc: Sara Russell [via email only]  
Deputy Attorney General